United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

74-1806

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRUCIT

EXXON CORPORATION,

Plaintiff-Appellant,

-against-

THE CITY OF NEW YORK, ENVIRONMENTAL PROTECTION ADMINISTRATION OF THE CITY OF NEW YORK, and ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants-Appellees.

GETTY OIL CO. (Eastern Operations), INC., GULF OIL CO.-U.S., MOBIL OIL CORPORATION and SUN OIL COMPANY OF PENNSYLVANIA,

Plaintiffs-Appellants,

-against-

THE CITY OF NEW YORK, HERBERT ELISH, ENVIRONMENTAL PROTECTION ADMINISTRATOR OF THE CITY OF NEW YORK, and the ENVIRONMENTAL PROTECTION ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF DEFENDANTS-APPELLEES FOR REHEARING

L. KEVIN SHERIDAN
ALEXANDER GIGANTE, JR.,
EVELYN J. JUNGE,

Of Counsel.

W. BERNARD RICHLAND
Corporation Counsel
City of New York
Attorney for Defendants-Appellees

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PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

By decision issued January 17, 1977, this Court determined that New York City regulations governing the lead content and volatility characteristics of gasoline offered for sale in New York City (New York City Administrative Code §§ 1403.2-13.11 and 1403.2-13.12, respectively) are preempted by regulations issued by the United States Environmental Protection Agency ("EPA") pursuant to § 211 of the Clean Air Act (42 U.S.C. § 1857f-6c) concerning the lead content of gasoline. Rehearing is sought only as to that portion of the decision which held that § 1403.2-13.12 of the New York City Administrative Code ("volatility regulations") is preempted and therefore void.

PRELIMINARY STATEMENT

This Petition For Rehearing is filed pursuant to Appellees' Application For An Extension of Time To File A Petition For Rehearing, granted by this Court on February 14, 1977.As noted in the application, rehearing is sought primarily to bring before the Court the opinion of the EPA

that its lead regulations do not, and were not intended to, preempt New York City's volatility regulations. As set forth in the affadavit accompanying the application, the EPA position on whether New York City's volatility regulations were preempted by federal lead regulations was not known to defendants-appellees ("City") until after the time to petition for rehearing had expired.

ARGUMENT

THE OPINION OF EPA THAT ITS LEAD REGULATIONS DO NOT PREEMPT NEW YORK CITY'S VOLATILITY REGULATIONS IS REASONABLE, ENTITLED TO GREAT WEIGHT AND SHOULD BE ADOPTED BY THIS COURT.

In determining that the City's volatility regulations were preempted by EPA lead regulations, this Court noted at the outset that "[t]his presents a closer question than the City lead content regulation which squarely conflicts with the federal regulation governing that precise fuel additive" (Slip Op. at 1442). In holding that preemption had, nevertheless, occurred, this Court found the City's regulation of volatility to be proscribed by the statute because it was "more onerous" than the federal regulation. In short, this Court held that EPA having acted to regulate one aspect of gasoline, i.e., lead content, the federal agency occupied the field of any further and different regulation of gasoline (e.g., volatility) by states or localities. In support of this reading of the preemptive

effect of regulations issued pursuant to § 211 of the Clean Air Act, this Court cited the preamble to the federal lead regulations (40 C.F.R. § 80.1): "This part prescribes regulations for the control and/or prohibition of fuels and fuel additives for use in motor vehicles and motor vehicle engines." (Slip Op. at 1443).

This Court's reading of the preemptive effect of the federal lead regulations is contrary to that of EPA, the agency which drafted the lead regulations and which is charged with the enforcement of the Clean Air Act. By letter dated February 11, 1977, to the New York City Corporation Counsel (attached hereto as Exhibit A), EPA specifically addressed itself to the question of whether, in the Agency's opinion, the City's volatility regulations had been preempted by the federal lead regulations. In that letter, EPA stated that the language quoted by this Court taken from its regulations "was never intended to suggest that EPA had preempted the entire field of [regulation of] all fuels and additives. Rather, that language was meant merely to identify the regulation as having been promulgated pursuant to Section 211(c)(1) of the Clean Air Act [42 U.S.C. § 1857f-6c(c)(1)] which uses the same wording."

Most importantly, the letter goes on to state:

> The position of the Agency is that states and local governments are free to regulate all aspects of fuels and fuel additives which have not been addressed by EPA regulations.
>
> At this time, the only aspects of fuels and fuel additives regulated by EPA are the availability of unleaded gasoline and the phasing down of the lead content of other gasolines.

The context of the letter, which is addressed to this Court's January 17, 1977 decision, makes it plain that EPA's position is that it is not necessary for a local government to resort to the mechanism of an implementation plan to regulate aspects of fuel and fuel additives not yet addressed by EPA regulations.

Unless a statute is "so plain in its commands as to leave nothing for construction," "great deference" is accorded the interpretation given the statute by the officers or agency charged with its administration. Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933); Udall v. Tallman, 380 U.S. 1, 16 (1965). It is not necessary that the agency's construction be the only one which could have been adopted, but merely that it be a reasonable interpretation. Train v. Natural Resources Defense Council, 421 U.S. 60,75 (1975).

That § 211(c)(4)(C) of the Clean Air Act is not "so plain" a statute as not to require construction is evidenced by this Court's statement that the question of whether federal lead regulations promulgated pursuant to that section preempt the City's volatility regulations presents "a closer question" than whether the City's lead regulations have been preempted. (Slip. Op. at 1442). Neither is this an instance where there is an unambiguous legislative intent overriding the administrative interpretation. Getty plaintiffs cited no reference to the Clean Air Act's legislative history which would support their position (adopted by this Court) and, indeed, we have been unable to find any reference to the Congress addressing itself to the point here raised. Cf., International Harvester Co. v. Ruckelshaus, 478 F. 2d 615, 639 (D.C. Cir. 1973).

Accordingly, the test is whether EPA's interpretation is "sufficiently reasonable" to preclude this Court from substituting its judgment for that of the agency. Train v. Natural Resources Defense Council, supra, at 87. We submit that the reasonableness of the interpretation is self-evident from the fact that there is no necessary relationship between the regulation of lead content and volatility characteristics

of gasoline. Lead is an additive to gasoline whereas volatility is regulated by removal of the butane pentane (C_4 C_5) fraction. Lead is never used to replace that fraction. Lead is regulated solely to control emission products, whereas volatility is regulated to control both emission products and evaporation at the pump. Furthermore, EPA has not made a determination that no regulation of volatility is required. The fact that this interpretation is being presented to the Court informally does not detract from its weight, so long as EPA's interpretation is not unnatural or unreasonable. Perine v. William Norton & Co. Inc. 509 F. 2d 114, 120 (2d Cir. 1974).

EPA's construction of the preemptive effect of its lead regulations pursuant to § 211 c(4)(C) is consistent with the rule of this Circuit that where the exercise of the local police power serves the purpose of the federal act, the preemption language of a federal statute must be narrowly construed. Chrysler Corporation v. Tofany, 419 F. 2d 499 (2d Cir. 1969). This Court has specifically held that "the Supreme Court has indicated that courts should hesitate before rejecting EPA interpretations of complex environmental legislation." Bethlehem Steel Corp. v.

Environmental Protection Agency, 538 F. 2d 513, 518 (2d Cir. 1976), citing Train v. Natural Resources Defense Council, 421 U.S. 60, 87 (1975). Indeed, because the federal lead regulations in point are the first (and only) regulations to be promulgated pursuant to § 211 c(4)(C) of the Clean Air Act, EPA's interpretation of their effect may be said to have "peculiar weight...[as] a contemporaneous construction of a statute by the men [sic] charged with the responsibility of setting its machinery motion, of making the parts work efficiently and smoothly while they are yet untried and new." Norwegian Nitrogen Co. v. United States, supra at 315. But even were this Court to find that the contemporaneous construction doctrine does not apply to this case, the fact of a non-contemporaneous construction "is not substantial enough to overcome the strong policy announced by the Supreme Court in Train [v. Natural Resources Defense Council, 421 U.S. 60 (1975)] in favor of according great defernce to EPA's interpretation of the statutes it administers, having in mind the complexity and technical nature of the statutes and subjects they regulate, the obscurity of the statutory language, and EPA's unique experience and expertise in dealing with the problems created by these conditions." American Meat Institute v. Enviromental Protection Agency, 526 F. 2d 442, 450 at fn. 16 (7th Cir. 1975).

CONCLUSION

FOR THE REASONS STATED ABOVE, WE URGE THIS COURT TO GRANT REHEARING AND, UPON REHEARING, TO VACATE THE ORDER OF JANUARY 17,1977 INSOFAR AS IT DETERMINED THAT NEW YORK CITY'S VOLATILITY REGULATIONS ARE PREEMPTED AND THEREFORE VOID.

February 28, 1977

Respectfully submitted,

W. BERNARD RICHLAND
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Attorney for Defendants-Appellees
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New York, New York 10007
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L. KEVIN SHERIDAN,
ALEXANDER GIGANTE, JR.,
EVELYN J. JUNGE,
of Counsel.

EXHIBIT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

10 FEB 1977

OFFICE OF
GENERAL COUNSEL

W. Bernard Richland, Esq.
Corporation Counsel
City of New York
1656 Municipal Building
1 Center Street
New York, N.Y. 10007

Dear Mr. Richland:

The Second Circuit's decision in Exxon Corp. v. The City of New York, No. 74-1806 (2d Cir. January 17, 1977) has recently been brought to our attention. We are concerned that the Court may have misinterpreted certain language in EPA's lead-in-gasoline regulation as it affects the ability of New York City to regulate other aspects of fuels, such as volatility.

While EPA's lead regulation states that it "prescribes regulations for the control and/or prohibition of fuels and additives" (40 C.F.R. § 80.1), this statement was never intended to suggest that EPA had preempted the entire field of all fuels and additives. Rather, that language was meant merely to identify the regulation as having been promulgated pursuant to Section 211(c)(1) of the Clean Air Act, which uses the same wording.

The position of the Agency is that states and local governments are free to regulate all aspects of fuels and fuel additives which have not been addressed by EPA regulations.

At this time, the only aspects of fuels and fuel additives regulated by EPA are the availability of unleaded gasoline and the phasing down of the lead content of other gasolines. 40 C.F.R. § 80.1-§ 80.26.

We hope this letter will assist you in presenting this issue to the Court.

Sincerely yours,

G. William Frick

G. William Frick
General Counsel (A-130)

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Evelyn J. Junge being duly sworn, says that on the 28th day of February 1977 She served the annexed Petition for Rehearing upon Shearman & Sterling, Esq., the attorney for the Appellant Exxon herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 53 Wall Street in the Borough of Manhattan, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
28 day of FEB., 1977

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Bruce Garner

Evelyn J. Junge

Form 323-50M-701108(71)

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Evelyn J. Junge being duly sworn, says that on the 28th day of February 1977 She served the annexed Petition for Rehearing upon Shea Gould Climenko & Casey Esq., the attorney for the Appellants Bellt, et al herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 330 Madison Avenue in the Borough of Manhattan, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
28 day of FEB., 1977

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Bruce Garner

Evelyn J. Junge

Form 323-50M-701108(71)